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No. 1072

IN THE

Supreme Court of the United States

JULIAN QUINTERO,

Petitioner,

v.

SINCLAIR REFINING COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Is a jury's determination of no liability of the defendant shipowner to be reversed?

STATEMENT OF THE CASE

The petitioner, a seaman, instituted suit against the respondent alleging that its employees were negligent and its vessel unseaworthy. After due deliberation, the jury brought in its verdict by answering interrogatories. The

jury found the vessel *was* seaworthy (Interrogatory No. I); that respondent was *not* negligent (Interrogatory No. III) and that petitioner's injury *was* the result of an unavoidable accident (Interrogatory No. XI).

The District Court entered judgment for respondent. The Court of Appeals affirmed. The petitioner now seeks a writ of certiorari.

REASONS WHY THE PETITION SHOULD NOT BE GRANTED

The Court of Appeals for the Fifth Circuit, after reviewing the evidence, affirmed the entry of judgment in respondent's behalf by the trial court. The Court of Appeals held that the controlling issues in the case were whether there was unseaworthiness of the vessel and negligence on the part of the respondent. Without affirmative findings to these interrogatories petitioner could not recover. The Court relied on *Neal* v. *Lykes Bros. Steamship Co., Inc.*, 5th Cir., 306 F. 2d 313.

However, without even discussing the Court of Appeals' decision, the petitioner seeks certiorari on the theory that an issue of unavoidable accident was improperly submitted to the jury. For this novel proposition, he cites two cases, neither of which has application.

In Mahnich v. *Southern Steamship Company*, 321 U.S. 96, the Court held a defective appliance would create the basis for a finding of unseaworthiness. It is vital to note that in *Mahnich*, the Supreme Court did not do two things which the petitioner claims: first, hold the vessel unseaworthy without a defective appliance (in *Mahnich*, liability was predicated on a broken ship's rope), and second hold that a vessel is responsible for an injury occurring without an unseaworthy condition.

Similarly, in *Tiller* v. *Atlantic Coast Line Railroad Company*, 318 U.S. 54, the Court did not hold the respondent liable without a finding of negligence. The Supreme Court held that if negligence was found, the employer could not defeat such a finding by raising the defense of assumption of risk.

The instant case is clearly not within the purview of the above decisions. First, the trier of fact found that vessel and all its appurtenances *were* seaworthy and that the respondent was *not* negligent. No defect and no negligent act or omission was the cause of the petitioner's injury. Whether or not the submission of an issue of unavoidable accident may or may not have been proper in a case in which there is some defect or negligent act or omission is a question not involved in this appeal.

Petitioner further complains that the trial court required him to carry a burden of proof heavier than the law requires. It is elementary that the trial court's charge must be considered as a whole. The phrase complained of, "he must prove to your satisfaction by a preponderance of the evidence" was used only one time, and even if harmful, cannot be considered as so prejudicial as to cause the reversal of the judgment entered on behalf of the respondent. Even the constant use of the words, "satisfy", "convince", "convincing", and "clear preponderance" is not sufficient. See *Oldkirk* v. *Sears, Roebuck & Co.*, 274 F. 2d 441 (9th Cir., 1960).

Petitioner is now appealing to the appellate courts to save him from an adverse verdict after trial by jury. He raises issues which present a facade to the real problem that there was no findings of unseaworthiness and negligence.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should not be granted.

Respectfully submitted,

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WILLIAM C. HARVIN

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DON F. MCNIEL

CERTIFICATE OF SERVICE

This is to certify that on the .... day of ....., 1963, a true and correct copy of this Brief in Opposition was served upon W. Jiles Roberts, Attorney for Petitioner, 617 Americana Building, Houston 2, Texas, by placing same in the United States mails, properly addressed, postage prepaid, Certified Mail — Return Receipt Requested.